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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4262

RIN 1212–AB53

Special Financial Assistance by PBGC—Withdrawal Liability Condition Exception

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule; response to comments.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) published a final rule in the Federal Register on July 8, 2022, concerning the requirements for special financial assistance applications and related restrictions and conditions pursuant to the American Rescue Plan (ARP) Act of 2021, and provided a 30-day comment period on the condition requiring a phased recognition of special financial assistance in a plan's determination of withdrawal liability. PBGC is amending its special financial assistance regulation to add an exception process for the conditions relating to withdrawal liability.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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SUPPLEMENTARY INFORMATION:

Executive Summary

On July 9, 2021, the Pension Benefit Guaranty Corporation (PBGC) issued an interim final rule with a request for comment, adding to its regulations a new part 4262 to implement the requirements under section 9704 of the American Rescue Plan Act of 2021, ''Special Financial Assistance Program for Financially Troubled Multiemployer Plans.''[1] On July 8, 2022, PBGC issued a final rule that made changes to the special financial assistance (SFA) program and requested comments on the condition requiring a phased recognition of SFA in a plan's determination of withdrawal liability (July 2022 final rule).[2] In response to comments received, PBGC is adding an exception process for certain withdrawal liability conditions that apply to a plan that receives SFA.

PBGC's legal authority for this rulemaking comes from section 4262 of the Employee Retirement Income Security Act of 1974 (ERISA) (Special Financial Assistance by the Corporation), which requires PBGC to issue regulations or guidance setting forth requirements for SFA applications, permits PBGC to provide for how SFA and earnings thereon are to be invested, and permits PBGC, in consultation with the Secretary of the Treasury, to impose reasonable conditions by regulation or other guidance on an eligible multiemployer plan that receives SFA. PBGC's legal authority also comes from section 4002(b)(3) of ERISA, which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, and from section 4003(a) of ERISA, which authorizes PBGC to conduct investigations and audits.

Background

Section 4262 of ERISA creates a program to enhance retirement security for millions of Americans by providing SFA to certain financially troubled multiemployer pension plans upon application for assistance. Section 4262 of ERISA sets forth the provisions for SFA, including which plans are eligible to apply, the cutoff date for applications, rules relating to actuarial assumptions and PBGC's determinations on applications, and restrictions on the use of SFA. It

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[1] The rule was published in the *Federal Register* on July 12, 2021, at 86 FR 36598.

[2] The rule was published in the *Federal Register* on July 8, 2022, at 87 FR 40968.

also provides that certain plans with suspended benefits must reinstate those benefits prospectively and provide make-up payments to restore previously suspended benefits. A plan receiving SFA under section 4262 has no obligation to repay SFA.

On July 9, 2021, PBGC issued an interim final rule on Special Financial Assistance by PBGC (29 CFR part 4262). Part 4262 provides guidance to multiemployer pension plan sponsors on eligibility for SFA, determining the amount of SFA, content of an application for SFA, the process of applying, PBGC's review of applications, restrictions and conditions, and reporting and notice requirements. On July 8, 2022, with the approval of PBGC's board of directors, PBGC published a final rule implementing changes to the SFA program, including changes to the methodology to calculate SFA, permissible investments for SFA funds (SFA received and any earnings thereon), the application of conditions on a plan that merges with a plan that receives SFA, and the withdrawal liability conditions that apply to a plan that receives SFA.[3]

In the July 2022 final rule, PBGC provided for a 30-day comment period solely on the condition requiring a phased recognition of SFA in a plan's determination of withdrawal liability in § 4262.16(g)(2). PBGC invited comments on whether the condition requiring a phased recognition of SFA in a plan's determination of withdrawal liability strikes the correct balance among stakeholders, or if a different condition might work better. Additionally, PBGC expressed its interest in hearing from stakeholders about what the expected impact of such a condition is likely to be and whether additional clarification or guidance would be useful.

PBGC received six comment letters on the conditions relating to the calculation of withdrawal liability. PBGC received one comment letter on permissible investments that was not relevant to the request for comments and, consequently, is not discussed in this document. The next section of this preamble discusses the conditions under § 4262.16(g), the six comment

[3] Under section 4002(a) of ERISA, PBGC is administered in accordance with policies established by its Board of Directors, which is made up of the Secretaries of the Department of Labor, the Department of the Treasury, and the Department of Commerce.

letters on the conditions relating to the calculation of withdrawal liability, PBGC's responses to the comments, and a summary of changes made in this final rule.

Conditions Relating to Withdrawal Liability, Public Comments, and PBGC's Responses

To ensure that SFA is used to pay benefits and the expenses related to those benefit payments, section 4262(m)(1) of ERISA expressly authorizes PBGC, in consultation with the Secretary of the Treasury, to impose reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to certain aspects of plan terms or operations. These conditions are described in § 4262.16 and include conditions that relate to withdrawal liability.

Under sections 4201 through 4225 of ERISA, when a contributing employer withdraws from an underfunded multiemployer plan, the plan sponsor assesses withdrawal liability against the employer. Withdrawal liability represents a withdrawing employer's proportionate share of the plan's unfunded benefit obligations and is an important source of income for the plan. To assess withdrawal liability, the plan sponsor must determine the withdrawing employer's (1) allocable share of the plan's unfunded vested benefits (UVBs) (the value of nonforfeitable benefits that exceeds the value of plan assets) as of the end of the plan year before the employer's withdrawal, or as otherwise provided under section 4211, and (2) annual withdrawal liability payment and amortization period under section 4219.

Interest Assumptions for Determining UVBs under the SFA Regulation

Under § 4262.16(g)(1), the interest assumptions used in determining UVBs for purposes of calculating withdrawal liability under section 4213(c) of ERISA must be the interest assumptions in appendix B to 29 CFR part 4044. The prescribed interest assumptions must be used until the later of: (1) 10 years after the end of the plan year in which the plan first receives payment of SFA; and (2) the last day of the plan year by which the plan projects that it will exhaust any SFA assets as determined under § 4262.4(b) (under which benefits and expenses are assumed to be paid exclusively from SFA assets until exhausted), extended by the number of years, if any, that the first plan year of payment is after the plan year that includes the SFA measurement date. The beginning of the 10-year period is the last day of the plan year in which the plan receives payment of SFA. For example, if a calendar year plan's SFA measurement date is in 2022, the plan receives payment of SFA in 2023, and had projected that it would exhaust SFA assets in 2051, the exhaustion year for the plan to use the prescribed interest assumptions would be 2052 (29 years + 1 year). Under this example, employers withdrawing before 2054 would have UVBs determined using the prescribed interest rates. While a plan is not required to use mass withdrawal interest assumptions beyond the specified period, the regulation does not preclude the use of settlement rates thereafter to determine withdrawal liability, as otherwise permitted by ERISA.

Phased Recognition of SFA Assets

Under § 4262.16(g)(2), a plan that receives SFA is required to recognize over time the amount of SFA received by the plan for the purpose of determining the plan's UVBs for calculating withdrawal liability.

Section 4262.16(g)(2) provides the procedures for determining the amount of SFA that is phased in for withdrawal liability purposes each year over the projected life of the SFA assets (determined as if SFA assets, i.e., SFA and earnings thereon, are exhausted before other plan assets are used to pay benefits and expenses). The applicable phase-in period runs from the first plan year in which the plan receives payment of SFA through the end of the plan year by which, according to the plan's projections, it will exhaust any SFA assets. For a plan that received payment of SFA under the terms of the interim final rule and files a supplemented application, the first plan year of payment is the year in which it received SFA under the terms of the interim final rule. Where a plan's first plan year of payment is not the plan year that includes the plan's SFA measurement date, the exhaustion year is deferred by the number of years the first plan year of payment is after the plan year that includes the SFA measurement date.

To calculate the amount of SFA assets excluded for each plan year during the phase-in period, the plan must take the total amount of SFA paid to the plan and multiply that by a fraction, the numerator of which is the number of years remaining in the phase-in period as of the date that the UVBs are being determined, and the denominator is the total number of years in the phase-in period. For a plan that receives payment of SFA under the interim final rule and receives a supplemental payment, the total amount (payment under the interim final rule and supplemental payment) will be included in the phased recognition of SFA assets in determining UVBs for withdrawals occurring in plan years after the plan year the supplemental payment is received by the plan. For withdrawals that occur after the date the supplemented application is filed and before the plan year after the plan year in which the supplemental payment is made, only the payment of SFA under the interim final rule is included in the phased recognition of SFA assets.

As provided in § 4262.16(g)(2)(xv), this condition is applicable to a plan in determining withdrawal liability for withdrawals occurring after the plan year in which the plan receives payment of SFA. However, for a plan that received SFA under the terms of the interim final rule, this condition will not apply unless the plan files a supplemented application. If the plan files a supplemented application, this condition applies to the plan in determining withdrawal liability for withdrawals occurring on or after the date the plan files the supplemented application. A plan may choose to file a supplemented application if it has already received SFA under the terms of the interim final rule.

Three examples are included in § 4262.16(g)(2) to illustrate the procedures for the phased recognition of SFA assets.

PBGC determined that requiring phased recognition of SFA as a plan asset is a reasonable condition under section 4262(m) of ERISA because SFA does not result from employer contributions, but is a transfer of taxpayer funds to statutorily eligible financially distressed plans for the purpose of enabling these plans to pay benefits and expenses. That purpose is reflected in sections 4262(j)(1) and 4262(*l*) of ERISA. Without the condition, the payment of SFA could instead result in indirect transfers of SFA to withdrawing employers from plans by reducing their withdrawal liability. For a majority of plans that receive SFA, all SFA will be recognized as a plan asset for withdrawal liability purposes within 10 years, and because additional SFA will be incorporated into the determination of withdrawal liability each year, the effect of the condition will lessen over time.

The phased recognition of SFA as a plan asset is consistent with ERISA, the Internal Revenue Code (the Code), and actuarial practice. It is conceptually similar to the smoothed recognition of plan assets for purposes of calculating a plan's minimum funding requirements. The Department of the Treasury regulation at 26 CFR 1.412(c)(2)–1(b) permits multiemployer plans to ''smooth'' plan asset values when determining minimum funding by averaging the value of plan assets over up to 5 years rather than using the current fair market value of plan assets. It is also roughly comparable to the gradual recognition of SFA in determining minimum funding. Section 432(k)(2)(D) of the Code requires that SFA be disregarded in determining required contributions. Internal Revenue Service (IRS) Notice 2021–38, 2021–30 IRB 155, provides that SFA is recognized in the plan's funding standard account over time, in that any benefit or plan expense paid from the SFA account generates an actuarial gain that is amortized over 15 years.

In response to the July 2022 final rule, three commenters generally supported the added withdrawal liability condition under § 4262.16(g)(2) or said that the phased recognition of SFA funds as a plan asset was an improvement over the interim final rule that required a plan that received SFA to immediately recognize the SFA funds as a plan asset. One commenter opposed the condition because of separation-of-powers principles. PBGC disagrees with this comment. As explained in the July 2022 final rule, Congress chose to expressly delegate authority in section 4262(m) of ERISA to PBGC to impose reasonable conditions on a plan that receives SFA relating to withdrawal liability. This grant by Congress expands PBGC's authority beyond its existing authority under section 4002(b)(3) and sections 4201 through 4225 of ERISA to regulate withdrawal liability and authorizes PBGC to provide rules that define how SFA should be treated in the calculation of withdrawal liability. The condition in § 4262.16(g)(2) reflects the authority Congress delegated to PBGC to oversee the SFA program and ensure that SFA is preserved for the payment of benefits and expenses.

One commenter was concerned that the phased recognition of SFA will not be effective after the first few years following a plan's receipt of SFA and suggested several ways of strengthening the condition. One suggestion was to apply the condition to all plans that receive SFA (including plans that have already applied for and received SFA under the terms of the interim final rule without requiring that the plan file a supplemented application) because contributing employers to these plans should not be treated more favorably in the calculation of withdrawal liability than employers in plans that have not yet been able to apply for SFA. Alternatively, the commenter suggested permitting a plan that received SFA before August 8, 2022, the option to adopt the condition without having to file a supplemented application. Another suggestion was for PBGC to affirm that the amount of excluded SFA should include the investment return on SFA for each year in the phase-in period. An additional suggestion was to apply the condition over the full 30-year period that SFA is intended to cover, but that a compromise might be to amortize the SFA over no fewer than a stated period of years, such as 20 years.

PBGC considered these suggestions but decided not to adopt them. PBGC provided a process in the July 2022 final rule for a plan that receives SFA under the terms of the interim final rule to have the withdrawal liability condition in § 4262.16(g)(2) apply to the plan. The condition applies to a plan in determining withdrawal liability for a withdrawal occurring on or after the date the plan files a supplemented application. The supplemented application used for this purpose is not burdensome for a plan to file. Regarding the amount to be phased-in, PBGC provided examples in the July 2022 final rule that make it clear that investment returns are not included in the calculation of the amount excluded. PBGC also considered requiring the condition to cover a longer period of time, but decided not to adopt this suggestion. A longer period, such as requiring the condition to cover 20 or 30 years, may not be reasonable for plans that receive a small amount of SFA and the contributing employers to those plans.

Another commenter who supported the phased-recognition of SFA over the projected payout period recognized that the length of that period may vary based on characteristics of the SFA-recipient plan. PBGC agrees with this comment. The condition in § 4262.16(g)(2) is reasonable and appropriate for plans because it applies only through the end of the plan year by which each plan projects it will exhaust SFA assets.

Some of the suggestions made by commenters are beyond the scope of this rulemaking. For example, one commenter suggested that PBGC impose a condition so that an employer that has an obligation to contribute to a plan for work performed in the building and construction industry that ceases operations or transfers operations outside the jurisdiction of its collective bargaining unit will incur withdrawal liability. Under section 4203(b) of ERISA, such employers are not considered to have withdrawn from the plan.

Two commenters requested that PBGC review the impact on the assessment of withdrawal liability when a plan that receives SFA is deemed to be in critical status through 2051. Under the Multiemployer Pension Reform Act of 2014, critical status plans must ignore certain contribution increases in calculating UVBs and withdrawal liability. One of these commenters suggested that PBGC add a condition to require plans that receive SFA to include contribution increases under a rehabilitation plan for withdrawal liability purposes. This issue raises interpretive issues about sections 305(g)(3), 305(d)(1)(B), and 305(f)(1)(B) of ERISA over which the Secretary of the Treasury has interpretive jurisdiction pursuant to section 101 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App.). PBGC is continuing to examine these issues with the Department of the Treasury and, if appropriate, may issue additional guidance.

Exceptions From Withdrawal Liability Conditions

PBGC received two comment letters requesting exceptions from the withdrawal liability conditions. One commenter requested an exception for single-owner professional employers stating that the phase-in of SFA does not provide sufficient relief from the withdrawal liability such employers could be assessed. The commenter proposed that PBGC provide for full consideration of SFA in the calculation of withdrawal liability for single-owner professional employers and relax the condition in § 4262.16(g)(1) requiring the use of a specific interest rate assumption. PBGC declines to add an exception for single-owner professional employers. The purpose of SFA is to help plans pay for benefits and plan expenses and not to indirectly subsidize employers to withdraw from these plans. PBGC is not making this change because if PBGC provided an exception for a special class, such as, single-owner professional employers, it would subsidize the withdrawal of these employers rather than discourage employer withdrawal.

Another commenter requested that PBGC grant exceptions from or modifications to the withdrawal liability conditions under § 4262.16(g)(1) and (2) for plans that have unique facts and circumstances, such as a plan that uses an alternative withdrawal liability allocation method, if applying the condition to the plan would result in a lower assessment of withdrawal liability, thereby incentivizing contributing employers to withdraw.

After considering the comment, PBGC determined that adding a process for a plan to request an exception from the withdrawal liability conditions in § 4262.16(g)(1) and (2) under narrow circumstances is reasonable. The conditions on withdrawal liability are intended to ensure that SFA is preserved for the payment of benefits and expenses and not used to subsidize employer withdrawals. If application of the conditions would result in an increase in employer withdrawals, the plan would be negatively impacted and the purpose of the conditions would not be met. Accordingly, PBGC is adding § 4262.16(g)(3), which provides a process for a plan sponsor to request approval from PBGC for an exception from the withdrawal liability conditions in § 4262.16(g)(1) and (2) under specific circumstances.

Under the exception process, a plan sponsor may request an exception from the withdrawal liability conditions by demonstrating to the satisfaction of PBGC that the exception lessens the risk of loss to plan participants and beneficiaries and does not increase expected employer withdrawals. The plan sponsor must also demonstrate that the exception does not increase the amount of the plan's SFA or unreasonably increase PBGC's risk of loss. A request for PBGC approval of an exception must be submitted by the plan sponsor or its duly authorized representative and must contain identifying, actuarial, and financial information described in § 4262.16(g)(3).

The exception process added by this final rule is separate from the SFA application process. A request for an exception from the withdrawal liability conditions may be submitted to PBGC either before the plan's initial application for SFA is filed or before a revised application is filed. A plan sponsor requesting an exception is encouraged to have a pre-submission consultation with PBGC.

When an application for SFA is prepared, a plan is required to take into account plan assets in determining the amount of requested SFA. Under § 4262.4(c)(4), this includes withdrawal liability payments made and expected to be made to the plan during the SFA coverage period taking into account a reasonable allowance for amounts considered uncollectible. Accordingly, if a plan sponsor submits a request for an exception from the withdrawal liability conditions, the plan's application for SFA must take the exception into account in the determination of the withdrawal liability payments expected to be made to the plan and the amount of requested SFA.

Compliance With Rulemaking Guidelines

Administrative Procedure Act

As described in the July 2022 final rule, PBGC's adoption of a condition requiring a phased recognition of SFA in a plan's determination of withdrawal liability under § 4262.16(g)(2) is consistent with PBGC's statutory authority to impose reasonable conditions on plans that receive SFA under section 4262(m) of ERISA. It is also more effective, along with the other conditions, for achieving the intended purposes of that statutory authority—to help enable plans that receive SFA to pay benefits due through 2051 and to preclude or disincentivize plans and employers from taking actions that have the potential to accelerate plan insolvencies. This condition was adopted after consideration of comments received on the withdrawal liability condition requiring the use of specified interest assumptions included in the interim final rule. PBGC provided for a comment period of 30 days on the new withdrawal liability condition in § 4262.16(g)(2) because it is an area of complexity that PBGC recognized may benefit from additional public comment. PBGC noted this additional opportunity for public comment on the condition would allow PBGC to assess the effectiveness of the withdrawal liability condition, consider adjustments or changes, and determine whether more clarification is needed regarding the condition or the mechanics of implementation. The preamble to the July 2022 final rule provided that to the extent PBGC determines that adjustments or changes to the withdrawal liability condition are appropriate and authorized, or that further clarification is needed, PBGC would revise the condition accordingly.

As discussed earlier in the preamble, in response to this comment solicitation, PBGC received comments on the phase-in condition in § 4262.16(g)(2) as well as on the condition requiring the use of specified interest assumptions in § 4262.16(g)(1). Following consideration of these comments, PBGC determined that it would be appropriate to provide a process for plans to apply for an exception to the conditions in § 4262.16(g)(1) and (2), that would be available where application of the conditions would result in an increase in employer withdrawals. Enabling a plan to apply for an exception from the withdrawal liability conditions based on the specific facts and circumstances of the plan will provide flexibility to ensure that the statutory purposes of SFA to pay for benefits and administrative expenses, as described earlier in this preamble, are met.

The Administrative Procedure Act provides at 5 U.S.C. 553(b) that notice and comment requirements do not apply when an agency, for good cause, finds that they are impracticable, unnecessary, or contrary to the public interest. An exception is also provided at 5 U.S.C. 553(d)(3) to the requirement of a 30-day delay before the effective date of a rule ‘‘for good cause found and published with the rule.’’ As described in PBGC's interim final rule and July 2022 final rule, Congress expressed a clear urgency for PBGC to implement an SFA program to get appropriate assistance to eligible plans as quickly as possible. Congress authorized PBGC to prioritize the filing of applications for eligible plans with the greatest need, during the first 2 years after March 11, 2021, and PBGC provided for such a process. PBGC is receiving and processing applications filed by these plans. Under this final rule, a plan eligible for SFA may apply for an exception to the withdrawal liability conditions before the plan files its SFA application. It is in the interest of a plan eligible to apply during the priority period to be able to determine if the plan should apply for an exception to the withdrawal liability conditions. Any delay in the effective date of the final rule would be contrary to the interests of the plan's participants and beneficiaries and could cause a delay in the submission of the plan's application and the plan's receipt of SFA. Accordingly, PBGC has determined that the public interest is best served by issuing this final rule expeditiously, without further opportunity for notice and comment, and that good cause exists for making the exception process set forth in this amendment effective less than 30 days after publication.

PBGC is making this rule effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act or CRA) (5 U.S.C. 801 et seq.), the Office of Management and Budget (OMB) has designated this final rule as a ‘‘major rule,’’ as defined by 5 U.S.C. 804(2)(a), which is a rule likely to result in an annual effect on the economy of $100 million or more. Section 808(2) of the CRA provides that, notwithstanding the effective date of a major rule defined under section 801, any rule which an agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal agency promulgating the rule determines. This good cause justification supports waiver of the 60-day delayed effective date for major rules under the CRA.

Because of the urgent need for the SFA program to distribute appropriate financial assistance to eligible plans quickly, PBGC has determined that this final rule must take effect [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. As described earlier in the preamble, this effective date allows eligible plans to apply for an exception from the withdrawal liability conditions and apply for SFA without unnecessary delay. Under the circumstances, PBGC has determined that public interest is best served by making this final rule effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. PBGC does not want to unduly delay providing financial assistance to plans.

Regulatory Impact Analysis

(1) Relevant Executive Orders and Regulatory Impact Analysis

Under Executive Order (E.O.) 12866, OMB reviews any regulation determined to be a ‘‘significant regulatory action.’’ Section 3(f) of E.O. 12866 defines a ‘‘significant regulatory action’’ as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the E.O.

OMB has determined that this final rule is economically significant under section 3(f)(1) and has therefore reviewed this rule under E.O. 12866.

E.O. 13563 supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in E.O. 12866, emphasizing the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. It directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects, distributive impacts, and equity).

PBGC has provided an assessment of the potential benefits, costs, and transfers associated with the final rule.

(2) Estimated Impact of Regulatory Action

As discussed earlier in the preamble, PBGC published a final rule on July 8, 2022, to modify its regulations under part 4262, which implement the requirements under ARP. It is through this program that PBGC is providing SFA to eligible multiemployer pension plans from a fund established by ARP for SFA purposes and credited with transfers from the general fund of the Department of the Treasury.

In the Regulatory Impact Analysis of the July 2022 final rule, PBGC provided estimates of the transfer amounts of the SFA program using Multiemployer Pension Insurance Modeling System (ME-PIMS), PBGC's stochastic modeling tool. The aggregate SFA was estimated to be approximately $82.3 billion in assistance payments paid to approximately 200 plans and $150 million to PBGC to administer the SFA program. PBGC further estimated that plans that received financial assistance from PBGC under section 4261 of ERISA in the form of loans will repay PBGC in aggregate approximately $385 million.

The addition of § 4262.16(g)(3), to provide plans with an exception process for the withdrawal liability conditions is expected in rare circumstances to impact the assumptions selected by the plan for projecting future withdrawal liability payments and ongoing employer contributions for purposes of determining the SFA amount in the plan's application. In the absence of an exception process under § 4262.16(g)(3), some plans may expect an increase in employer withdrawals and a decrease in employer contributions following receipt of SFA. Consequently, without the exception, these plans would be expected to incorporate these anticipated employer withdrawals into their withdrawal liability payment assumption, which could increase the SFA requested in their applications. Although this circumstance would be expected to be limited to very few plans, PBGC estimates that the addition of § 4262.16(g)(3) could decrease overall SFA program transfers by $1 to $2 billion.

As discussed earlier in the preamble, PBGC considered regulatory alternatives based on the public comments provided during the 30-day comment period on the withdrawal liability condition in § 4262.16(g)(2) included in the July 2022 final rule. Under one such regulatory alternative, PBGC considered extending the period of time for the phased recognition of SFA in a plan's determination of withdrawal liability. PBGC decided not to adopt this suggestion because a longer period, such as requiring the condition to cover 20 or 30 years, may not be reasonable for plans that receive a small amount of SFA and for the contributing employers to those plans. PBGC also considered leaving the withdrawal liability condition unchanged. However, it was decided that the addition of a narrow exception process under § 4262.16(g)(3) will enhance the ability of plans, based on their specific facts and circumstances, to retain employers and minimize the likelihood that the receipt of SFA could induce employers to withdraw from these plans.

Regulatory Flexibility Act

Because PBGC is not publishing a general notice of proposed rulemaking under 5 U.S.C. 553(b), the regulatory flexibility analysis requirements of the Regulatory Flexibility Act do not apply. See 5 U.S.C. 601(2).

Paperwork Reduction Act

With this final rule, PBGC is submitting changes to the collection of information, previously approved under control number 1212–0074, to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act. OMB's decision regarding this information collection request will be available at www.Reginfo.gov. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Under § 4262.16(g)(3), PBGC is adding a request for a determination from PBGC for approval of an exception from the withdrawal liability conditions under § 4262.16(g)(1) and (2). PBGC estimates that, beginning in 2023, it will receive an average of only one request per year with an average annual hour burden of 8 hours and an average annual cost burden of $25,000. In addition, under the circumstances described in § 4262.16(d), (f), and (h), a plan sponsor may file a request for a determination from PBGC for approval of an exception from SFA conditions relating to reductions in contributions, transfers or mergers, and settlement of withdrawal liability. PBGC estimates that beginning in 2023, PBGC will receive an average of 2.2 requests per year for these additional determinations. PBGC needs the information required for a request for determination to determine whether to approve an exception from each of the specified conditions of receiving SFA. PBGC estimates that, beginning in 2023, PBGC will receive an average of 3.2 requests per year for all determinations. PBGC estimates an average annual hour burden of 15.6 hours and average annual cost burden of $44,000.

The estimated aggregate average annual hour burden for the next 3 years for the information collection in part 4262 is 878.6 hours for employer and fund office administrative, clerical, and supervisory time. The estimated aggregate average annual cost burden for the next 3 years for the information collection request in part 4262 is $2,130,400, for approximately 5,326 contract hours assuming an average hourly rate of $400 for work done by outside actuaries and attorneys. The actual hour burden and cost burden per plan will vary depending on plan size and other factors.

List of Subjects in 29 CFR Part 4262

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, PBGC is amending 29 CFR part 4262 as follows:

PART 4262—SPECIAL FINANCIAL ASSISTANCE BY PBGC

1. The authority citation for part 4262 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1432.

2. In § 4262.16, add paragraph (g)(3) to read as follows:

§ 4262.16 Conditions for special financial assistance.

*   *   *   *   *

(g) *   *   *

(3) *Request for exception.* The plan sponsor of a plan eligible for special financial assistance may request approval from PBGC for an exception from the conditions under paragraphs (g)(1) and (2) of this section by demonstrating to the satisfaction of PBGC that the exception lessens the risk of loss to plan participants and beneficiaries and does not increase expected employer withdrawals. The plan sponsor must also demonstrate to the satisfaction of PBGC that the exception does not increase the amount of the plan's special financial assistance or unreasonably increase PBGC's risk of loss. A request for PBGC approval of an exception must be submitted by the plan sponsor, or its duly authorized representative, either before an initial application or before a revised application for special financial assistance is filed by the plan, and must contain all of the following identifying, actuarial, and financial information:

(i) Name, address, email, and telephone number of the plan sponsor and the plan sponsor's authorized representatives, if any.

(ii) The nine-digit employer identification number (EIN) assigned to the plan sponsor by the IRS and the three-digit plan identification number (PN) assigned to the plan by the plan sponsor, and, if different, the EIN and PN last filed with PBGC. If an EIN or PN has not been assigned, that should be indicated.

(iii) Most recent plan document or restatement of the plan document and all subsequent amendments adopted (if any) and most recent Declaration of Trust.

(iv) Administrative manuals and other documents governing the plan's assessment or administration of withdrawal liability.

(v) A copy of the most recent actuarial valuation performed for the plan before the date of the plan's submission of a request for approval under this paragraph (g)(3), and the actuarial valuation performed for each of the 2 plan years immediately preceding the most recent actuarial valuation.

(vi) A copy of the plan actuary's most recent certification under section 305(b)(3) of ERISA, including a detailed description of the assumptions used in the certification, and the basis under which they were determined. The description must include information about the assumptions used for the projection of future contributions, withdrawal liability payments, and investment returns, and any other assumption that may have a material effect on projections.

(vii) A statement of whether the plan sponsor is requesting an exception from the condition under paragraph (g)(1) or (2) of this section or both and a demonstration of how the proposed exception lessens the risk of loss to plan participants and beneficiaries and does not increase expected employer withdrawals. The statement must also include a demonstration that the exception does not increase the amount of the plan's special financial assistance or unreasonably increase PBGC's risk of loss.

(viii) A list of employers contributing greater than 5 percent of plan contributions in a plan year.

(ix) A certification by the plan's actuary that the amount of special financial assistance that will be requested in the plan's application for special financial assistance will be determined assuming the exception will be approved.

(x) A detailed statement certified by an enrolled actuary of the effect of the proposed exception, and a demonstration for 30 years that the estimated withdrawal liability payments and contributions with the proposed exception exceed the estimated withdrawal liability payments and contributions without the proposed exception. The demonstration must show an aggregate of all withdrawal liability payments and an aggregate of all contributions for each year in the 30-year period and include representative examples of employer withdrawal liability payments and contributions. An individual employer's withdrawal liability assessment reflecting the proposed exception must be no less than what would be assessed without the proposed exception.

(xi) Any additional information PBGC determines it needs to review a request for approval of a proposed exception.

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Issued in Washington, DC, by

Gordon Hartogensis,
Director,
Pension Benefit Guaranty Corporation.

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